INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	5
Argument:	
Introduction and summary	18
I. A merger of strong carriers that would seriously reduce competition between them can be justified only by a showing that the merger would meet a serious transportation need or provide other important public benefits	23
II. Having found that the Northern Lines merger would eliminate substantial competition, and having pointed to no countervailing serious transportation need or other important public benefit, the Commission improperly approved the merger	36
A. The "drastic lessening of competition" that the Commission found in its First Report remains despite the Second Report's efforts to reinterpret the same record	36
1. The loss of competition between the Northern Lines	41
2. Competition from other modes of transportation	45
3. Competition from the Milwaukee	50
B. The Commission has identified no seriou transportation need or other public benefit that would be more likely to result from the merger than from continued rail competition	55
C. Thus, the Commission and the court below failed to apply the proper legal standard	61
Conclusion	66
Appendix	69

350-343—69——1

CITATIONS

Cases:

	Page
B. & O.R. Co. v. *Aberdeen & R. R. Co.*, 393 U.S. 87	49
B. & O.R. Co. v. *United States*, 386 U.S. 372	2, 29, 31, 36, 58
Burlington Truck Lines v. *United States*, 371 U.S. 156	40, 49
Chicago, Milwaukee, St. Paul & Pacific R. Co. v. *Spokane, Portland & Seattle Ry. Co.*, 300 I.C.C. 453, sustained *sub nom. Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States*, 182 F. Supp. 81, affirmed, 366 U.S. 745	55
Denver & R.G.W.R. Co. v. *United States*, 387 U.S. 485	26
Federal Maritime Commission v. *Svenska Amerika Linien*, 390 U.S. 238	28
Florida East Coast Railway Co. v. *United States*, 259 F. Supp. 993, affirmed *per curiam*, 386 U.S. 544	21, 29
Great Northern Pac. Ry. Co. Acquisition, 162 I.C.C. 37	44
County of Marin v. *United States*, 356 U.S. 412	29
McLean Trucking Co. v. *United States*, 321 U.S. 67	23, 24, 25, 26, 28, 31, 37
Minneapolis & St. Louis R. Co. v. *United States*, 361 U.S. 173	24, 29, 37
Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co., 327 I.C.C. 279	20
New York Central Securities Corp. v. *United States*, 287 U.S. 12	32, 65
Northern Natural Gas Co. v. *Federal Power Commission*, 399 F. 2d 953	29
Northern Securities Co. v. *United States*, 193 U.S. 197	7, 8, 30
Penn-Central Merger Cases, 389 U.S. 486	21, 27, 28, 29, 65
Scenic Hudson Preservation Conf. v. *Federal Power Commission*, 354 F. 2d 608	58
Schwabacher v. *United States*, 334 U.S. 182	29
Seaboard Air Line R. Co. v. *United States*, 382 U.S. 154	21, 24, 28, 36, 37

Cases—Continued

	Page
Securities and Exchange Commission v. *Chenery*, 318 U.S. 80	40
Southern Pacific Co. v. *United States*, 277 F. Supp. 671, affirmed *per curiam*, 390 U.S. 744	45
Southern Pac. Co.—Control—Western Pac. R. Co., 327 I.C.C. 387	20, 45, 59
St. Joe Paper Co. v. *Atlantic Coast Line R. Co.*, 347 U.S. 298	30, 31, 32, 34
Thompson v. *United States*, 343 U.S. 549	55
Udall v. *Federal Power Commission*, 387 U.S. 428	58
United States v. *American Ry. Exp. Co.*, 265 U.S. 425	55
United States v. *Great Northern R. Co.*, 343 U.S. 562	55
United States v. *Pennsylvania R. Co.*, 323 U.S. 612	55
United States v. *Southern Pacific Co.*, 259 U.S. 214	30, 45
United States v. *Third National Bank*, 390 U.S. 171	37
United States v. *Union Pacific R.R. Co.*, 226 U.S. 61	30, 45
Volkswagenwerk Aktiengesellschaft v. *United States*, 390 U.S. 261	29
Western Pac. R. Co. v. *United States*, 382 U.S. 237	55

Statutes:

Emergency Railroad Transportation Act of 1933, 48 Stat. 211	32
Interstate Commerce Act, 49 U.S.C. 1, *et seq.*:	
Section 1(4)	55
Section 3(4)	55
Section 5	12, 16, 29, 36
Section 5(2)	3, 61
Section 5(2)(a)	3
Section 5(2)(b)	4, 9, 23, 24
Section 5(2)(c)	4, 5, 23
Section 5(11)	24
Section 15(3)	55
Section 15(4)	55, 56
National Transportation Policy, 49 U.S.C. preceding Section 1	3, 20, 24, 26, 56, 61, 62
Shipping Act, 46 U.S.C. 814	28
Transportation Act of 1920, 41 Stat. 456, *et seq.*	29, 30, 31, 32, 33
Transportation Act of 1940, 54 Stat. 898	23, 29, 35

Congressional:
86 Cong. Rec.:
Page
5864–5885 ---- 35
10149 ---- 35
H.R. 2531, 76th Cong., 1st Sess ---- 33
H. Rep. 2014, 76th Cong., 3d Sess ---- 35
H. Rep. 2830, 76th Cong., 3d Sess ---- 35
Rail Merger Legislation, Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on S. 3097, 87th Cong., 2d Sess ---- 57, 59, 66
Report of the Committee appointed September 20, 1938, by the President of the United States to Submit Recommendations upon the General Transportation Situation, December 23, 1938 ---- 32
Report of the National Transportation Committee, February 13, 1933 ---- 32
Report of the President's "Committee of Three", H. Doc. No. 583, 75th Cong., 3d Sess. ---- 32
S. 2009, 76th Cong., 1st Sess. ---- 33
S. Rep. No. 445, Report on the National Transportation Policy by the Special Study Group of the Senate Committee on Commerce, 87th Cong., 1st Sess. ---- 30
Transportation Act of 1939, Hearings before the Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess. ---- 33, 34
Miscellaneous:
Conant, *Railroad Mergers and Abandonments*, pp. 25–42
Fieleke, *Toward a More Efficient Railroad System*, March/April 1969, New England Economic Review ---- 56
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Peck and Meyer, *The Determination of a Fair Return on Investment for Regulated Industries*, Transportation Economics, (Columbia University Press 1965) ---- 58

Miscellaneous—Continued

Saunders Defends Merger, New York Times, Sunday, March 9, 1969, Section 3, p. 1, column 8 ..... Page 57

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In the Supreme Court of the United States

OCTOBER TERM, 1969

NORTHERN LINES MERGER CASE

No. 28

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

No. 38

CHARLES E. BRUNDAGE, ET AL., APPELLANTS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

No. 43

CITY OF AUBURN, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

No. 44

LIVINGSTON ANTI-MERGER COMMITTEE, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (App. 1) is reported at 296 F. Supp. 853. The several pertinent decisions of the Interstate Commerce Commission (App. 61, 245, 463, 498) are reported at 328 I.C.C. 460, 331 I.C.C. 228, 331 I.C.C. 869, and 333 I.C.C. 391.

JURISDICTION

The order of the three-judge district court denying an injunction against the Commission orders in issue was entered November 20, 1968 (App. 59–60). The notice of appeal in No. 28 was filed December 5, 1968, and the notices of appeal in Nos. 38, 43 and 44 were filed on December 20, December 5, and December 12, 1968, respectively. Probable jurisdiction was noted on February 24, 1969, and the cases were consolidated (App. 1337). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2325. *B. & O. R. Co.* v. *United States,* 386 U.S. 372.

QUESTION PRESENTED

Whether the Interstate Commerce Commission's approval of the merger of the Great Northern and Northern Pacific railroads and their railroad subsidiaries is supported by the requisite showing that benefits to the public interest outweigh the elimination of substantial rail competition in the Northern Tier of the United States.[1]

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[1] Nos. 38 and 44 present distinct questions, relating respectively to the terms of the stock exchanges involved in the merger and to the Northern Pacific's title to the franchise and right of way used by that railroad. The United States expressed no posi-

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, is as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), provides as follows in pertinent part:

> (a) It shall be lawful, with the approval and

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tion on these questions in the proceedings below and expresses none here. The question in No. 43 is largely the same as that in No. 28, with which this brief is concerned.

authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties therefore in separate ownership; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *

* * * * *

(b) * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

STATEMENT

1. THE FACTS

A. THE MERGING RAILROADS

On February 17, 1961, three major railroads serving the northwestern United States applied to the Interstate Commerce Commission for authority to merge. These three principal applicants were the Great Northern Railway Company ("Great Northern") and the Northern Pacific Railway Company ("Northern Pacific"), together known as the Northern Lines, and their jointly-owned subsidiary, the Chicago, Burlington & Quincy Railroad Company ("Burlington"). Also parties to the application were the Spokane, Portland and Seattle Railway Company ("SP&S"), owned by the Northern Lines jointly, and the Pacific Coast Railroad Company ("Pacific Coast"), a subsidiary of the Great Northern (App. 66, 248).

Under the applicants' proposal, the Northern Lines, the Burlington and the Pacific Coast would be merged into a new company, which would acquire the subsidiaries of the merged companies as well as all their leasehold, trackage and joint use rights in the lines of other carriers and the terminals incidental thereto. The new company would lease the SP&S and thereby also acquire that company's subsidiaries and trackage rights. The applicants sought Commission authorization for the issuance of stock and securities, assumption of obligations, and other authority to effectuate the merger.

The Great Northern operates across the Northern Tier of states (Minnesota, North Dakota, Montana, Idaho and Washington) between Duluth and the Twin Cities and Seattle, Portland and Vancouver. The Northern Pacific operates across the same territory over routes lying somewhat to the south of the Great Northern's lines. Since the Northern Lines serve "the same Pacific ports, the same lake ports, the same large eastern terminals, and the same tier of States over parallel lines, each line is the most aggressive and important competitor of the other" (App. 73; see App. 254).[2]

The routes of the Burlington extend from Chicago to the Twin Cities and to points in the Midwest, and by subsidiaries reach the Gulf of Mexico. "There is no substantial competition * * * between either of the Northern Lines and the Burlington, since the latter's lines are in great part complementary to those of its parents" (App. 254).

The main line of the SP&S provides the most direct route from Spokane to Portland and is of strategic importance to the Northern Lines, since Spokane lies on their main transcontinental routes and Portland is an important terminal for both of them (App. 72). The Pacific Coast is a relatively short line in King County, Washington.

The principal applicants—the Great Northern the Northern Pacific and the Burlington—are large,

[2] Since the primary findings of fact in the Commission's First Report disapproving the merger (App. 61–243) are not amended or challenged in the Second Report approving the merger (App. 245–462), we refer to both Reports in stating the underlying facts.

strong and prosperous railroads (App. 78). The resulting company would constitute one of the largest rail systems in the nation, with nearly 27,000 miles of track extending from the Great Lakes across the Northern Tier to the Pacific Coast and, through affiliates, to the Gulf of Mexico (App. 252). It would enjoy assets of nearly $3 billion, annual railway operating revenues of $823 million, annual railway operating income of $95 million, and total annual income of $131 million (App. 282, 428).

B. RAIL COMPETITION IN THE NORTHERN TIER

The Great Northern and the Northern Pacific have been each other's principal competitors in the Northern Tier for over half a century.[3] They are directly competitive at points accounting for about 43 percent of their gross revenues and 34 percent of their total tonnage, and compete also for overhead traffic (*i.e.*, traffic not originating or terminating on their systems) which accounts for an additional 12 percent of their revenues (App. 145).

The Northern Tier region served by the Northern Lines is rich in forest, agricultural and mineral products which in 1963 accounted for 65 percent of Great Northern's carload revenue and 58 percent of that of the Northern Pacific (App. 75). The long-haul transportation of these products is generally not attractive to motor carriers, and water transportation is not a

[3] One of their earlier attempts to merge was set aside by this Court as a violation of the Sherman Act. *Northern Securities Co* v. *United States*, 193 U.S. 197. Other efforts to merge the Northern Lines are summarized by the Commission at App. 150–154.

major factor in the area (App. 138–139). For these reasons, rail transportation is "of primary importance" in the Northern Tier (App. 253; see App. 77).

The Northern Lines' principal competitor in the Northern Tier is the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee"), whose routes extend from Chicago northwest via the Twin Cities to Seattle, Tacoma and Longview, Washington. The Milwaukee was built after the *Northern Securities* case, *supra,* n. 3, was decided in 1904, primarily to compete with the Northern Lines, but it has not become a major rate-making transcontinental railroad of substantial competitive significance. Compared with the Northern Lines, the Milwaukee has been an extremely weak carrier. In 1964 it carried only 12 percent of east-west traffic to and from the Pacific Northwest moving through four representative gateways, while the Northern Lines carried over 60 percent (App. 145). Its net income has always been much smaller than that of either the Northern Lines or the Burlington. The combined 1965 net income of the three major applicants ($81.6 million) was eleven times greater than the Milwaukee's ($7.3 million), and the combined net income of the Northern Lines alone ($64.9 million) was eight times greater (App. 105).

2. THE COMMISSION'S 1966 DECISION

Following public hearings in 1961–1962 in which the Department of Justice and other intervenors including the other appellants actively participated, the hearing examiner in 1964 submitted a report recommending approval of the merger. In a decision ren-

dered on March 31, 1966 (328 I.C.C. 460, App. 61–244, hereafter "First Report"), the Commission (6–5) concluded that the merger, even with appropriate conditions,[4] would not be consistent with the public interest and denied the applications. While acknowledging that consolidation would produce certain operating efficiencies and make possible savings to the applicants of $25.5 million a year by the tenth year after merger, the Commission found "that the disadvantages of an appropriately conditioned merger—a drastic lessening of competition and adverse effects on carrier employees—outweigh the benefits that might be derived by applicants and the shipping public" (App. 166–167).

The First Report's analysis of the competitive effects of the merger was as follows:

First, the Commission held that it should focus its competitive analysis on the Northern Tier states in which the Northern Lines operate because "this is the area where vigorous intramodal competition exists and is threatened" (App. 143); the Burlington, the other principal applicant, serves a different area in which the merger will have little competitive impact (App. 73).

Second, the Commission found that, in the Northern Tier, the Northern Lines engage in extensive direct competition at common points and for overhead traffic which account for 55 percent of their revenue (App. 145).

[4] In passing upon rail unification proposals, the Commission is expressly empowered to impose "such terms and conditions * * * as it shall find to be just and reasonable" (49 U.S.C. 5(2)(b)).

Third, the Commission found that competition between the Northern Lines affects a vast amount of transport, since they carry some 83 percent of the eastbound and 61 percent of the westbound traffic between the Northwest and the Twin Cities moving through four representative gateways (App. 146).

Fourth, the Commission found that the long-haul bulk cargo transportation of the Northern Tier's main products, which generates most of the Northern Lines' revenue, is not generally susceptible of diversion to other modes; hence, the preservation of rail competition between the Northern Lines is of special importance (App. 165).

Fifth, while recognizing that the Milwaukee could be strengthened by attaching conditions to the merger, the Commission found that its *relative* competitive position after merger would be worse (App. 147). The conditions that the Commission considered included the opening of 11 gateways (*i.e.*, the establishment of Milwaukee-Northern Lines through-routes through 11 interchange points so located as to give Milwaukee an opportunity to solicit for the longest possible hauls); and a grant of entry into Portland where it could connect with Pacific coast carriers. However, the Commission concluded that even with these conditions the result of the merger would be that "there would be one very large and strong railroad and one relatively weak carrier, whereas there are today two strong rail carriers and one relatively weak carrier" (App. 164).

The Commission acknowledged that both shippers and the applicants would derive some benefits from improved routing and monetary savings (chiefly through job reduction) which the merger might ultimately produce. But it observed that vigorous competition between the Northern Lines has already spurred them to provide improved service to the public and that their financial strength enables them to continue to do so (App. 166, 158). The Commission concluded, therefore, that the applicants had not demonstrated merger benefits of such scope and importance as to outweigh drastic lessening of competition between the dominant carriers in the Northern Tier.

3. THE 1967 DECISION ON RECONSIDERATION

On July 27, 1966, the applicants petitioned for reconsideration, asserting that they were willing to accept all the protective conditions sought by the Milwaukee and by another affected road, the Chicago and North Western Railway ("North Western");[5] that they would enter into attrition agreements for the protection of their employees; and that the merger would yield savings greater than estimated in the First Report. While the petition was pending, the applicants and the Milwaukee entered into an agreement (Ex. No. 250) which provided that the Milwaukee would receive all the conditions it was seeking and accordingly would support the merger and withdraw any opposition to it. The agreement also pro-

[5] The North Western is a "relatively short haul carrier" that serves primarily Wisconsin, Iowa, Minnesota, South Dakota, Nebraska and Illinois (App. 94).

vided that the Northern Lines would not oppose Commission authorization of the Milwaukee-North Western merger then and now pending before the agency, and would seek only standard protective conditions in that proceeding.[6] A similar agreement was concluded with the North Western (Ex. No. 251). Thereafter, the Milwaukee and the North Western withdrew their qualified opposition to the Northern Lines merger and urged the Commission to approve it.

On January 4, 1967, the Commission reopened the proceeding for reconsideration and limited further hearing. The hearing occupied four days and was confined to the question of predicted merger savings in the light of the applicants' agreements with the Milwaukee and the North Western and changes which had occurred on the systems of the merging lines since the close of the hearings in June 1962.

On November 30, 1967, the Commission (8–2) reversed its prior ruling and approved the merger (331 I.C.C. 228, App. 245–462, hereafter "Second Report"). It held that the prior report had failed to recognize Section 5's affirmative purpose to encourage mergers consistent with the public interest, and that this error had contributed materially to the result there reached (App. 312).

With respect to the basic issue of loss of competition, the Commission concluded that it should focus on "the competitive effects systemwide, *i.e.*, beyond the four northern tier States," including the vast area

[6] On December 18, 1968, a Commission hearing examiner recommended approval of the proposed Milwaukee-North Western merger. ICC Finance Dockets Nos. 24182 *et al.*

to the south served by the Burlington (App. 317). It did not reject the findings of the First Report, nor had it received any new record evidence on competition. Instead, it simply stressed the obverse of the systemwide measures of loss of intramodal competition previously developed, noted generally that intermodal competition was more significant today than in earlier years, and changed from its prior focus on measures of competition for the traffic carried to a generalized focus on the number of carriers serving the various points on the lines (App. 316–318). Thus, the Commission now relied heavily upon a table showing the number of railroads, truck lines, bus lines and air lines at ten selected cities in the applicants' territory, five of them not in the Northern Tier (App. 318) and, without further analysis, declared that the data showed that, "at the commercially most significant points in the applicants' territory, there is * * * substantial intermodal and intramodal competition" (*ibid.*).

With respect to the Milwaukee, the Commission now concluded that, unless the merger with its attached conditions were approved, the Milwaukee would be relegated "to an increasingly marginal and deteriorating role," while "[o]n the other hand, a properly conditioned merger, with [the new company] competing against a strengthened Milwaukee, will serve to achieve a more desirable competitive pattern" (App. 321). It presented neither new evidence nor new analysis to explain this reversal of its position in the First Report.

Apart from its conclusion that the merger would probably result in greater savings to the parties than had originally been estimated (App. 298–305) and its discussion of the Milwaukee, the Commission pointed to no prospective benefits from the merger that had not been considered in the First Report.[7] These benefits were aptly summarized in the Commission's conclusion that the combination of the applicants would result in "a more proficient transport agency" (App. 344). They include "faster and more dependable single-line service" (App. 305–306) [although the First Report had pointed out that "competition has already produced faster transcontinental freight train schedules than the schedules originally proposed by applicants" (App. 162)]; improved tracing and location of shipments (App. 308) [although the First Report found that the improvement would not be material in light of the improvements that computerization would permit in any event (App. 162)]; improved freight car utilization (App. 309 [which the First Report found "counteracted by the loss of competition which now spurs applicants to meet to the demands of the shippers at common points" (App. 162)]; reduced damage from handling and improved handling of claims (App. 308–309) [which the First Report found "too insignificant" to consider (App. 162)]; and a generally expanded routing with better transit and diversion privileges for

[7] The Commission did, however, conclude that the hardships to employees that had earlier been of concern would be relieved by conditions since agreed to (App. 343).

shippers (App. 305) [which the First Report had also taken into account (App. 161–162)].

In a subsequent report dated April 11, 1968 (331 I.C.C. 869, App. 463–497), the Commission modified one of the Milwaukee conditions and denied all petitions for reconsideration. A further report dated June 17, 1968 (333 I.C.C. 391, App. 498–503) resulted from the Commission's discovery that the Milwaukee and the Northern Lines had apparently intended that the eleven Milwaukee gateways not be opened to the vital grain traffic of the Northern Tier; holding that the strengthening of the Milwaukee was a *sine qua non* of approval, the Commission ruled that use of the gateways could not be so restricted.

4. THE DECISION OF THE DISTRICT COURT

On May 9, 1968, the United States filed a complaint challenging the Commission orders approving the merger,[8] and on November 20, 1968, a three-judge court (Bazelon, Fahy and Curran, JJ.) unanimously

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[8] Two other suits challenging the orders in issue were instituted in federal district courts in New York and Washington; the plaintiffs in those cases intervened in the government action. The intervenor-plaintiffs included the Northern Pacific Stockholders Protective Committee, the Board of Railroad Commissioners of the State of Montana, the State of Washington, the City of Auburn, Washington, and the Livingston Anti-merger Committee. A motion for leave to intervene was filed by the Public Service Commission of Minnesota but it took no part in the proceedings. Of these parties only Auburn, the Stockholders Committee and the Livingston Anti-merger Committee have appealed.

The applicant railroads, the Milwaukee, 230 Pacific Northwest Shippers and the Public Utility Commissioner of Oregon intervened as defendants in support of the Commission.

affirmed the Commission's determination and dismissed the complaint (App. 1–60).

The court rejected the government's argument that the Commission had construed Section 5 as establishing a presumption in favor of mergers: "While the Commission interpreted the national policy as encouraging mergers, we do not think it was guided by a presumption" (App. 21). The court held that the Commission had "evidenced an understanding of the governing guidelines" (App. 22), but did not specify what those guidelines are in the area of competition. Its statement that "consolidation must be shown and not presumed to be consistent with the public interest" (App. 21) gave no indication that any competitive standard should guide the Commission's free exercise of discretion. Nor did its discussion of the Commission's findings on competition indicate anything more than an agreement that the findings were reasonable and supported by evidence.

With respect to intramodal competition, the court concluded that the Second Report's analysis, based upon the points at which the applicant railroads compete directly, was adequate. It considered that the Commission's "finding that the allocation of traffic is not wholly the result of competitive forces", taken together with its points analysis, was "broadly indicative of the weakness of the Department of Justice's emphasis on raw statistics" (App. 24).

The court further rejected the government's argument that the Commission had erred in failing to analyze adequately the relative competitive strengths

of the Milwaukee and the applicants after the merger, holding that the evidence supported the Commission's conclusion that the Milwaukee would be an enhanced competitor. It viewed this conclusion narrowly, however, not as a finding of "an over-all enhancement of competition but rather as an enhancement of the competitive situation of Milwaukee in relation to Northern Lines" (App. 30, n. 15). It found it unnecessary to reach a decision on the government's contention that the Milwaukee could have been strengthened by means other than the merger, holding that "the fact that some of those benefits might possibly otherwise have been obtained hardly detracts from the actual advantage of the present conditions, if, as we believe, they give support to the Commission's findings that the merger is consistent with the public interest" (App. 34).

Turning to intermodal competition, the court found that there was substantial evidence to support the Commission's conclusion in the Second Report that actual and potential intermodal competition was great enough to "justify the reduction or elimination of inter-railroad competition" (App. 36–37). This consisted of general testimony that motor carriers were cutting into the rail traffic in many products, that Class I motor carriers operating in the merger territory had an average length of haul longer than the average for either of the Northern Lines; and that new highways would shorten truck time between the Northwest and the Twin Cities. The court did not discuss the Commission's finding in the First Report that the Northern Tier produces large quantities of

low-rated high-volume bulk commodities which are not generally attractive to motor carriers.

Accordingly, the district court found that the Commission had properly concluded that "the competitive situation which will result from the merger is consistent with the public interest * * *" (App. 37-38). Disposing also of the contentions of the other appellants here and of contentions by the United States and others that are not raised in this Court, the district court sustained the Commission's orders in full. It stayed the effectiveness of the merger, however, pending prompt appeal to this Court, and on December 16, 1968, this Court extended the stay until further order of this Court.

ARGUMENT

INTRODUCTION AND SUMMARY

This case involves a proposed combination of five railroads with over 26,500 miles of track into a single system. The Great Northern and Northern Pacific railroads and their jointly owned subsidiary, the Burlington line—all strong and healthy carriers—would pool assets of $2.8 billion, including vast natural resource properties, and total gross income of $131.1 million (in 1966). Competition between the two leading rail lines linking the Pacific Northwest with the East would be eliminated, and the new conglomerate company would have an overwhelming dominance over rail transportation across the Northern Tier of states. The Northern Tier contains some 10.5 million people and thousands of farms, businesses, mines, and factories which, the Commission has found, are vitally

dependent upon rail transportation. The merger would not only permanently alter the rail structure from the Great Lakes to the Pacific; it would also affect other proposals for equally vast changes in the nation's rail systems which are now pending before the Commission, and might well foreclose future combinations of far greater public benefit.[9]

In the last 15 years about 30 rail consolidations of all kinds, including acquisitions of control, have been approved by the ICC.[10] Some of these consolidations have been end-to-end or "supplementary" combinations creating new routes without substantial loss of competition; some have been "complementary" combinations of railroads which serve the same territories but do not offer directly competing service. These two categories of combination affect traffic

[9] In addition to the Northern Lines proposal, the Commission has before it the proposed union of the Northern Lines' weaker competitor, the Milwaukee, with the North Western, a proposal which appears to be at least in part a defense against the competitive consequences of the Northern Lines merger. See note 6, *supra*. It is also considering a proceeding involving conflicting proposals for control of the Rock Island. *Chicago & North Western Railway Company—Control—Chicago, Rock Island and Pacific Railroad Company*, ICC Finance Docket No. 22688.

For a discussion of these possibilities and an overview of the western rail merger problem see *Western Railroad Mergers*, a Staff Study by the Office of the Assistant Secretary for Policy Development and the Federal Railroad Administration, Department of Transportation (January 1969), copies of which are being lodged with the Clerk.

[10] *Western Railroad Mergers*, *supra*, p. 2. See the appendix to this brief for a listing of major merger approvals in recent years.

interchange and have their greatest effect upon railroads seeking to protect existing relationships—*i.e.*, they affect *competitors*. In contrast, those mergers which, like the present one, involve parallel lines serving the same transportation markets directly affect *competition* for shippers' business. They come closest to the classic horizontal merger because they have the greatest impact on competition. Thus they present the greatest competitive concern under the National Transportation Policy (49 U.S.C. preceding Section 1; see pp. 23–29, *infra*) and accordingly should be subjected to the closest scrutiny by the Commission. However, since the current merger wave began, only two major proposals for unified control of competing routes have been rejected by the Commission.[11]

In reversing its initial disapproval of the present merger, the Commission has made no findings showing that continued adequate transportation service by the Northern Lines requires their consolidation, or that there would be any beneficial consequences to the public except the conventional results of any such combination of competitors—predicted savings to the parties and prospects for some operational efficiencies, offset by a substantial loss of competitive pressures toward better transportation service. Whether the savings claimed will be reserved for railroad operations or diverted to non-transportation activities of the resulting conglomerate does not appear. Nor does the Second Report consider the extent to which the

[11] *Southern Pac. Co.—Control—Western Pac. R. Co.*, 327 I.C.C. 387; *Missouri Pac. R. Co.—Control—Chicago & E.I. R. Co.*, 327 I.C.C. 279.

claimed savings and efficiencies might be achieved without merger, although the earlier findings show substantial possibilities along this line.

Both the Commission's Second Report and the district court's opinion place primary reliance upon this Court's approval of the Penn-Central [12] and Seaboard-Atlantic Coast Line [13] mergers. But the Northern Lines merger arises in a wholly different context and would have wholly different effects. There are here no allegedly faltering giants (as in *Penn-Central*) whose union would not only buttress one another but save a vitally needed carrier (the New Haven). The merger applicants are each among the most prosperous railroads in the country. The Northern Lines' only rail competition in the Northern Tier comes from the relatively weak Milwaukee, as contrasted with the powerful Southern in the Seaboard-Coast Line case, where the Commission could say that the reduction of rail competition was "not substantial" (320 I.C.C. 122, 167). And intermodal competition is of less significance in the Northern Tier than in almost any other section of the country—certainly far less than in the relatively crowded corridors where Penn-Central and Seaboard-Coast Line operate.

The Commission's First Report carefully evaluated the competitive factors and found insufficient countervailing public benefits to satisfy the public interest. The Second Report—*with no new evidence on com-*

[12] *Penn-Central Merger Cases*, 389 U.S. 486.

[13] *Florida East Coast R. Co.* v. *United States*, 259 F. Supp. 993 (M.D. Fla.), affirmed *per curiam*, 386 U.S. 544; *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (*per curiam*).

petition or benefits (apart from enlarged estimates of monetary savings for the applicants)—left the earlier findings basically undisturbed and reached the opposite conclusion, with no real justification other than a reassessment of the Commission's statutory duty. Where the First Report found the examiner's reliance upon "a policy of favoring railroad mergers" to be "a perversion of legislative history and intent" (App. 158), the Second Report "view[ed] anew the question of competition in light of our finding that [the statute] * * * was certainly not negative or restrictive toward mergers * * *" (App. 312–313). Where the First Report held that the Commission could approve a merger involving such "a substantial lessening of competition throughout a large territory" only "on the basis of countervailing public interest considerations" (App. 159), the Second Report, as affirmed by the district court, merely concluded that the competitive situation which resulted from the merger is "consistent with the public interest" (App. 37–38).

We submit that the Commission's reversal of its original assessment of the public interest was premised upon an unwarranted change in its conception of the applicable standards. Cost reductions, savings and operational efficiencies have historically come from competition without the accompanying disadvantages to shippers of dependence upon a single dominant carrier. Therefore, when substantial interrailroad competition would be eliminated between strong parallel competitors, the remaining intermodal and intramodal competition is weak, and the area is

heavily dependent upon rail service, the Commission may not, consistent with the National Transportation Policy and Section 5(2)(b) of the Interstate Commerce Act, approve a merger without greater justification than the parties' claims of savings and efficiencies. The principles that this court has recognized in *McLean Trucking Co.* v. *United States,* 321 U.S. 67, and its subsequent decisions on the role of competition in the railroad and other regulated industries require that such a drastically anticompetitive merger be justified by evidence that it would meet a serious transportation need or provide other important public benefits. In this case neither the Commission nor the district court has pointed to any such need or benefit, and accordingly their approval of the Northern Lines merger is based upon an erroneous conception of the applicable standards.

I. A MERGER OF STRONG CARRIERS THAT WOULD SERIOUSLY REDUCE COMPETITION BETWEEN THEM CAN BE JUSTIFIED ONLY BY A SHOWING THAT THE MERGER WOULD MEET A SERIOUS TRANSPORTATION NEED OR PROVIDE OTHER IMPORTANT PUBLIC BENEFITS

A. Section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. 5(2)(b), as modified by the Transportation Act of 1940, 54 Stat. 898, 906, establishes the basic principle that the Interstate Commerce Commission may approve a merger of carriers only if, "subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction * * * will be consistent with the public interest." Subsection 5(2)(c) admonishes the Com-

mission more particularly to "give weight to the following considerations, *among others:* (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (Emphasis added.)

If the Commission approves a merger, the participating carriers "are relieved from the operation of the antitrust laws," 49 U.S.C. 5(11), and it is well established that a merger is not tested strictly by the principles of those laws. *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173; *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154. However, the Commission's obligation under Section 5(2)(b) to give weight to the effect of a proposed merger upon adequate transportation service to the public, as well as its duty to further the overriding National Transportation Policy,[14] makes competition a significant factor. *McLean Trucking Co.* v. *United States,* 321 U.S. 67.

> The preservation of independent and competing * * * carriers unquestionably has bearing on achievement of [the ends of the national transportation policy]. Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense

[14] 49 U.S.C. preceding Section 1, set forth at p. 3, *supra.*

relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.

In short, the Commission must *estimate the scope* and *appraise the effects* of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. [*Id.* at 87; emphasis added.]

Although this Court's review of the Commission's action in *McLean* acknowledged broad administrative discretion, it also treated that discretion as one channeled within ascertainable statutory limits in the area of competition, 321 U.S. at 88. The Commission's authorization for the motor carrier consolidation in question [15] was affirmed only after a searching evaluation of the consideration that the Commission had given to the competitive effects. This Court noted the adequately supported findings that substantial *intermodal* competition would remain, and further, with respect to *intramodal* competition, took pains to emphasize the Commission's determination, "on the basis of facts appearing in the record and its experience with other consolidations, that it was not likely that [the merged

[15] Rail and motor carrier consolidations are, of course, governed by the identical statutory provisions and standards. 321 U.S. at 78–79.

firm's] size and competitive advantages would enable it to control the price and character of interchange traffic, to drain off substantial amounts of shippers' business or in other ways to smother the competition of other motor carriers." 321 U.S. at 89.

It is clear from *McLean* that the Commission, in assessing the seriousness of anticompetitive effects, may not automatically discount loss of intramodal competition because of the continuing existence of competition—however strong—from other modes of transportation. It is an express purpose of the National Transportation Policy "to recognize and preserve the inherent advantages of each [mode]". Achievement of this purpose clearly requires not only vigorous intermodal competition—which tends to allocate particular kinds of traffic to the mode best suited to carry them—but also intramodal competition—which assures optimum performance by each mode and preserves to shippers a choice of carriers within each mode.

Subsequent decisions of this Court have made it clear that, even apart from the special limitations of the National Transportation Policy, the term "public interest" as used in Section 5 and in other regulatory statutes embraces a significant competitive element. This Court has held (*Denver & R. G. W. R. Co.* v. *United States*, 387 U.S. 485, 492-493):

> Both the ICC and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anticompetitive effects. Thus the ICC is required to weigh anticompetitive effects in

approving applications for merger or control under § 5 of the Act, authorizing the ICC to grant such applications only if "consistent with the public interest." *McLean Trucking Co.* v. *United States*, 321 U.S. 67. And similarly broad responsibilities are encompassed within like broad directives addressed to other agencies. *E.g., National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224; *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94; *California* v. *FPC*, 369 U.S. 482, 484–485.

This Court has recently held that because the merger of competing railroads is a departure from our traditional national policy, which makes competition the primary regulator of the economy, "* * * before a rail merger is approved, there must be convincing evidence that it will serve the national interest and that terms are prescribed so that the congressional objective of a rail system serving the public more effectively and efficiently will be carried out. Obviously, not every merger or consolidation that may be agreed upon by private interests can pass the statutory tests." *Penn-Central Merger Cases*, 389 U.S. 486, 500. To be sure, the Penn-Central merger—like the Northern Lines merger—did eliminate very substantial intramodal competition between the parallel lines of the major parties, and this Court nonetheless approved it. But, in applying the foregoing principles, this Court was careful to point out the special transportation needs involved and the important public benefits that would follow from the merger. The Commission had found that the profits of the Pennsylvania and the New York Central as separate

entities were insufficient for the maintenance of essential but non-self-supporting services (such as commuter operations), and further had found that, apart from a merger in which the New Haven could be included, there was no hope for the salvation of that essential line. 389 U.S. at 500–501.

This Court has even more recently had occasion to elaborate upon its suggestions in *McLean* and *Penn-Central* concerning the public benefits required to outweigh serious anticompetitive effects in regulated areas not strictly subject to the antitrust laws. Interpreting the Federal Maritime Commission's similar obligation to evaluate anticompetitive effects in scrutinizing carrier agreements under Section 15 of the Shipping Act (46 U.S.C. 814), this Court recently held that serious anticompetitive effects "alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor." *Federal Maritime Commission* v. *Svenska Amerika Linien,* 390 U.S. 238, 246. The Court went on to hold (*id.* at 243, 245, n. 4) that the FMC's standard requiring the proponent of a seriously anticompetitive agreement to "demonstrate that * * * [it] was *required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose*" is "in full accord with the kind of accommodation between antitrust and regulatory objectives approved by this Court in [*Seaboard Air Line R. Co.* v. *United*

States, 382 U.S. 154,[16] and *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173] * * *." [17] (Emphasis added.) See also *Northern Natural Gas Co.* v. *Federal Power Commission,* 399 F. 2d 953 (C.A.D.C.). We submit that this standard should have been—but was not—applied in this case.

B. The limitation that this standard would impose upon the Commission's exercise of its discretion under Section 5 is fully consistent with both the legislative history of that section and, more generally, with the goal of substantial simplification of railroad systems that underlay the Transportation Acts of both 1920 and 1940.[18]

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[16] The subsequent summary affirmance of the district court's order on remand in the *Seaboard* case is no authority to the contrary (*Florida East Coast Railway Co.* v. *United States,* 259 F. Supp. 993 (M.D. Fla.), affirmed *per curiam,* 386 U.S. 544). This Court's affirmance preceded both *Penn-Central* and *Svenska Amerika.* And the district court's decision had not excused the Commission from its duty carefully to evaluate the competitive consequences of a rail merger. The court found that despite the loss of intramodal competition and the creation of a rail monopoly in one portion of the State of Florida, the record showed there was substantial remaining competition both from another major rail system—the Southern—and from other modes operating in the relatively crowded Southeastern territory. The competition which would remain, it held, was the crux of the matter (259 F. Supp. at 1010).

[17] Such consideration of antitrust implications is not discretionary. It is required under the *Svenska Amerika* case. See *Volkswagenwerk Aktiengesellschaft* v. *United States,* 390 U.S. 261, 273–274.

[18] See *County of Marin* v. *United States,* 356 U.S. 412, 417; *Penn-Central Merger Cases,* 389 U.S. 486, 492–493; *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 386–387; *Schwabacher* v. *United States,* 334 U.S. 182.

Until the adoption of the Transportation Act of 1920, rail mergers, like industrial combinations in other sectors of the economy, were governed by the antitrust laws. See, *e.g., Northern Securities Co.* v. *United States,* 193 U.S. 197; *United States* v. *Union Pacific R. R. Co.,* 226 U.S. 61; *United States* v. *Southern Pacific Co.,* 259 U.S. 214. During World War I, however, the serious effects of overbuilding, financial manipulation, and lack of coordination led to a threatened breakdown of vitally needed rail operations, and the railroads had to be taken over by the federal government.[19] After the war, the Transportation Act of 1920, 41 Stat. 456–499, provided for termination of federal control and also undertook to deal with the structural difficulties that had befallen the industry. It directed that the Commission "as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems." 41 Stat. 481. The statute contemplated that strong roads would absorb weak roads and that the resulting systems would employ uniform rates in the movement of competitive traffic, each earning substantially the same rate of return. It is clear from the legislative history that the primary goal was not the economies that might result from consolidation but correction of the financial problems resulting from the disparity of returns between weak and strong rail-

[19] Leonard, *Railroad Consolidation under the Transportation Act of 1920,* pp. 40–43 (1946). See *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U.S. 298, 315–321.

roads.[20] And the 1920 Act expressly directed that in the national consolidation plan "competition shall be preserved as fully as possible." 41 Stat. 456, 481.[21] The consolidation plan provided for in the 1920 Act was intended to be voluntary,[22] and the goal of incorporating the weak railroads into the stronger proved to be unattainable. The Commission's tentative plan ran into heavy opposition and it soon became apparent that promulgation of a final plan which would be acceptable to the owners and managements of the nation's railroads was extremely unlikely. In 1929 the Commission adopted a final plan of consolidation (159 I.C.C. 522, modified, 163 I.C.C. 188; 183 I.C.C. 663; 185 I.C.C. 403) but no substantial effort to comply with it was ever undertaken by the

[20] See Leonard, *op. cit. supra*, at 57–59; S. Rep. No. 445, Report on the National Transportation Policy by the Special Study Group of the Senate Committee on Commerce, 87th Cong., 1st Sess., p. 324; *B. & O. R. Co.* v. *United States*, 386 U.S. 372, 425–426 (concurring opinion).

[21] In the *McLean* case the Court observed (321 U.S. 67, 84, n. 20):

> Even after the major shift in policy reflected in the Transportation Act of 1920, Congress left it abundantly clear that the preservation of competition and the elimination of monopolistic practices in many phases of the transportation industry was a desideratum. See e.g., 15 U.S.C. §§ 13, 14, 18–21; 38 Stat. 730 *et seq.*, 48 Stat. 1102, 49 Stat. 1526–1528; 31 I.C.C. 32, 61; 31 I.C.C. 351, 413–414; and § 5(1) of the Interstate Commerce Act, 41 Stat. 480–481; 54 Stat. 905; and compare *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U.S. 35.

[22] See *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, *supra*, 347 U.S. at 316, 317.

nation's railroads.[23] In the meantime, the structure of the nation's railroad system was being altered through acquisitions of control and other steps short of consolidation.[24]

The Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 217, brought all forms of railroad combinations under a single standard, based upon the public interest and harmony with the Commission's plan. But neither this legislation nor subsequent bills seeking to compel consolidations brought forth any solution to the railroad problem.[25] Finally, in 1938 President Roosevelt appointed a committee made up of three railroad executives and three labor representatives. This "Committee of Six" recommended abolition of the consolidation plan, leaving all initiative in the matter to the railroads themselves.[26]

A bill based on this report was introduced in the House by Chairman Lea of the House Committee on

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[23] Numerous legislative attempts to compel consolidation were defeated during this period. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, *supra*, 347 U.S. at 317–318.

[24] See Leonard, *op. cit. supra*, 119–255. The 1920 Act permitted "consolidations" (*i.e.*, merger of railroad properties into a single corporation) only if consistent with the overall plan, but permitted acquisitions of "control" if they were approved by the Commission as in "the public interest". *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 23.

[25] See Report of the National Transportation Committee, February 13, 1933; Report of President's "Committee of Three", H. Doc. No. 583, 75th Cong., 3d Sess. 3639.

[26] Report of the Committee appointed September 20, 1938, by the President of the United States to Submit Recommendations upon the General Transportation Situation, December 23, 1938.

Interstate and Foreign Commerce. H.R. 2531, 76th Cong., 1st Sess. The bill would have permitted the Commission to approve consolidations if they were in the public interest, and further specified that "in determining the public interest the Commission shall give due consideration to * * * the ultimate establishment of a number of strong and efficient systems." Provision was also made for a report by a transportation administrator who would undertake to "strengthen the transportation system in the most effective way with a minimum of destructive competition," and, if he deemed it necessary, to prepare legislation for compulsory consolidation.

At the same time, Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, also introduced a bill, S. 2009, 76th Cong., 1st Sess., which dealt with a wide range of subjects. Most important for our purposes was its inclusion of a declaration of national transportation policy, elimination of the provisions in the law calling for a comprehensive plan, and substitution of a voluntary system in which mergers would be initiated by the carriers subject to approval of the Commission under a general public interest standard. The Chairman of the Committee of Six, Carl R. Gray of the Union Pacific, testified that the purpose of the proposal was simply to eliminate the rigid barriers to consolidation represented by the comprehensive-plan provision of the 1920 Act.[27]

[27] See *Transportation Act of 1939*. Hearings before the Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., 19–20;

Much of the opposition to the bill came from railway labor groups who feared that elimination of the Commission's plan would encourage consolidations with resulting job reductions.[*] Senator Wheeler's colloquy during the hearings with Mr. Tom McGrath, General Counsel of the Brotherhood of Railroad Trainmen in this connection (Hearings, *supra*, note 27, at 387–405) has been described by this Court as "the best insight into the prevailing attitude toward compulsory mergers". *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, *supra*, 347 U.S. at 319. Senator Wheeler stated that "so far as this bill is concerned, it does not have anything to do with consolidations, except to repeal that which has been on the statute books, that everybody concedes is not effective and does not amount to anything." (*Id.* at 397). Senator Wheeler recognized that there had to be a consolidation provision in the law because "[t]here may be cases where consolidations are permissible", *i.e.*, on a finding that the consolidation is in the public interest. *Ibid.* He then assured Mr. McGrath, whose views in opposition to encouragement of consolidation had been expounded at length, that "they do not differ from mine." *Ibid.*

Former Federal Transportation Coordinator Eastman testified that the bill did not go into integration of transportation facilities, operating costs and financial transactions "with the exception that it would open up the door a little wider than it is now open to railroad consolidations, which might well have the effect of eliminating some of the waste." *Id.* at 767.

[*] Hearings Before the Senate Committee on Interstate Commerce on S. 1340, S. 2016, S. 1869 and S. 2009, 76th Cong., 1st Sess., *supra*, 391–395.

There followed a series of proposals and counter-proposals reflecting the tension between those advocating elimination of the comprehensive-plan restriction on consolidations and the labor interests desirous of retaining it or substituting a prohibition on any consolidation that would displace employees.[29] The ultimate compromise was the original Wheeler bill formulation, with additional assurance of protection to employees.[30] H. Rep. No. 2830, 76th Cong., 3d Sess., pp. 10, 68–69.

Thus, although there were strong proponents of consolidation, and the Commission itself felt predisposed to consolidation—even compulsory consolidation on a limited basis—there was also strong opposition. The enacted bill followed most closely the pattern established by Senator Wheeler, who evidently felt that while some consolidations might be desirable and thus should be made possible, no affirmative policy in favor of consolidations should be formulated or implemented. The only "facilitation" of consolidations intended was the elimination of the requirement that they conform to the Commission plan, a requirement felt to be obstructive even of consolidations for which there was a serious transportation need.

As we have seen, the 1940 Act—which is the present law—continued to emphasize the significance of competition through the National Transportation Policy

[29] See H. Rep. 2014, 76th Cong., 3d Sess., p. 61; 86 Cong. Rec. 5884–5885.

[30] 86 Cong. Rec. 10149.

and the public interest criteria of Section 5. This was a necessary safeguard, because of the obvious risk that the carriers, now free to choose their own plans, would tend to initiate proposals of the greatest private advantage to themselves. The net effect of the 1940 amendments, therefore, was to *increase*, not to decrease, the Commission's responsibility to make a critical examination of each particular merger proposal in the light of its impact on the region to be served, on other railroads, and on the overall structure of the nation's rail system. See *B. & O.R. Co.* v. *United States*, *supra*, 386 U.S. at 426–427, 436–437 (concurring opinion).

II. HAVING FOUND THAT THE NORTHERN LINES MERGER WOULD ELIMINATE SUBSTANTIAL COMPETITION, AND HAVING POINTED TO NO COUNTERVAILING SERIOUS TRANSPORTATION NEED OR OTHER IMPORTANT PUBLIC BENEFIT, THE COMMISSION IMPROPERLY APPROVED THE MERGER

A. THE "DRASTIC LESSENING OF COMPETITION" THAT THE COMMISSION FOUND IN ITS FIRST REPORT REMAINS DESPITE THE SECOND REPORT'S EFFORTS TO REINTERPRET THE SAME RECORD

We do not contend that the Commission had an obligation to determine whether the Northern Lines merger would violate the antitrust laws if they were applicable; this Court has determined in *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, that such a determination is not an element in the Commission's consideration of a carrier merger. Nor do we disagree with the Commission's statement in the Second Report that the anticompetitive impact of this merger

"does not in itself automatically compel denial of the applications" (App. 313). We seek no more than to give effect to the principles that this Court reiterated in *Seaboard*, 382 U.S. at 156, quoting from *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 186, which in turn quoted from *McLean, supra*, 321 U.S. at 87:

> The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' [Bracketed matter in quoted text.]

If that thrice-repeated language is to have any meaning, the process of balancing competitive effects against benefits must be based on a thorough and (insofar as possible) accurate assessment of a proposed merger's impact on competition. Compare, in another context, *United States* v. *Third National Bank*, 390 U.S. 171, 183. And no meaningful evaluation of the scope and effects of curtailment of competition can be made without a fair consideration of the relevant markets and the role of the competitors in them; there is simply no other way to do the job.

The Commission attempted in the First Report to meet these criteria. It considered the competitive impact of the merger both from the standpoint of the total transportation market (App. 134–139) and, because of the inherent advantage of railroads over

motor carriers in moving long-haul, low-rated bulk commodities and piggyback, from the standpoint of rail transportation as a distinctive market (App. 140-150). It identified the geographic market in which competition would be affected by the merger—the Northern Tier. It found that the lines of the Great Northern and Northern Pacific were generally parallel, serving five major terminals: Head of the Lakes (Duluth-Superior) and Twin Cities at the eastern end and Spokane, Seattle and Portland at the West, and it excluded the Burlington from consideration because it is not a competitive factor in this area. It measured the loss of competition between the Northern Pacific and the Great Northern by various indicia, including the percentage of their gross revenues (43%) and total tonnage (34%) at points where they are directly competitive; the percentage of their gross revenues attributable to direct competition for overhead traffic (12%); and, most important, the relevant market shares for long-haul freight traffic between the Northwest and the Twin Cities moving through representative gateways, from which it projected an estimate of the amount of such carload traffic moving east (83%) and west (61%) which the new company would handle after merger. In addition, it explored the total ton miles the new company would handle in the main Northern Tier states (67%). On these bases, it concluded that, even with a strengthened Milwaukee, the merged company's dominance in the Northern Tier, both intermodally and intramodally, would result in a "drastic lessening of competition" (App. 166).

The Second Report attempted no similar analysis, nor did it make any new findings (App. 312–323). Instead the Commission attempted to play down the competitive effects by emphasizing the obverse of the first report—*i.e.*, that at points accounting for 57% of their revenue the applicants do not directly compete. It further asserted in general terms that at the principal points in the Northern Tier served by one or more of the applicants the apportionment of traffic was not wholly the result of the interplay of competitive forces and that stations served by one of the applicants and one other rail carrier are generally also served by other modes. The specific figures cited in the Second Report largely ignore the crucial amount of *traffic* (including overhead traffic) as to which competition would be lost, and instead concentrate simply upon the number of *points* on the combined lines where competition would not be reduced. The percentage figures used are, moreover, severely distorted by the expansion of the area considered from the Northern Tier market to the entire post-merger system, including the separate area of the Burlington reaching south to the Gulf States, throughout which competition would be unchanged. Finally, considering again the identical conditions that it had rejected as inadequate in the First Report, the Commission now found that the Milwaukee's competitive position would be strengthened.

The Second Report did not, as we have noted, alter or challenge any of the underlying findings of the First Report as to what the effects of the merger would be upon the particular elements of competition

that would be eliminated. Those findings are in general valid, and, of course, the Commission cannot on this appeal question their reliability when it failed to do so in its decision approving the merger now under review. *Securities and Exchange Commission* v. *Chenery,* 318 U.S. 80, 87; *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168–169. All the new Report changed was the Commission's conclusions as to the overall magnitude of the relevant competitive effects (as well as the weight to be given to those effects vis-à-vis the benefits of the merger, a subject that will be discussed in the following section of this brief).

We submit that the tests applied in the assessment of competition in the First Report—while imperfect as the Commission recognized (App. 143–144)—provided, taken together, a fair and workable measure of the competitive effects of the merger. Conversely, the Second Report's reevaluation of the underlying findings is a retreat from the commendable approach of the First, and seriously understates the competitive impact of the proposal that the Commission has now approved. But even so, the Second Report does not deny that the merger would have significant anticompetitive effects. Rather, the Second Report could go no further than to assert that "there is, and after the merger would continue to be substantial intermodal and intramodal competition" (App. 318), including "enhancement" of the Milwaukee.

In the following portions of this section of the brief we discuss in greater detail the major factors in the Commission's reevaluation of competition in the Sec-

ond Report, as well as the arguments that have so far been made on judicial review in support of the Second Report's conclusions.

1. THE LOSS OF COMPETITION BETWEEN THE NORTHERN LINES

We have pointed out the lack of any justification for the Second Report's determination to measure the loss of competition among the merger parties on a systemwide basis—including the territory of the noncompetitive Burlington—rather than in the Northern Tier, which clearly defines the appropriate transportation market. It does not, of course, help the public interest in adequate rail competition in the Northern Tier simply to point out that the anticompetitive effects of the merger are relatively mild in another transportation market.

Equally important and equally unjustified is the Second Report's determination to concentrate solely upon common points as a measure of competition.

Competition in a transportation market is commonly measured in terms of the amount of traffic moving between two particular points.[31] A measure based simply on the number of common points served is probably one of the least meaningful measuring devices, since it does not reflect the amount of traffic served at the various points. For example, two merging railroads might compete directly at stations

[31] Meyer, Peck, Stenason and Zwick, *Competition in the Transportation Industries*, 205. The cities need not be served directly by the competing railroad so long as the carrier also forms a part of the route between the two points. Thus the Commission in the First Report properly took into account the Northern Lines' competition for overhead traffic accounting for 12 percent of their revenues (App. 145).

accounting for 100 percent of their revenue, but if together they carry only one percent of the rail traffic in their area, their merger would have a negligible effect on competition. Or, carriers might be directly competitive at only 10 percent of the points served; but if these points accounted for a large share of their traffic and of the total traffic moving in the area served, their merger would have major competitive consequences. Of great importance in this case, therefore, are the measures of east-west traffic moving through representative gateways, which show that the Northern Lines have a combined market share of 61 percent and 83 percent moving to and from the Pacific Northwest (App. 147). The Second Report, however, chose to ignore altogether these crucial findings of the First Report.

Even apart from this measure of the amount of *traffic* moving over the competing lines,[32] the magnitude of the rail competition that would be lost in the merger is shown by the fact that the Great Northern and the Northern Pacific are direct competitors at *points* accounting for 43.8 percent of their gross revenues; the Second Report does not question this finding.[33] Adding to this figure the 12 percent of

[32] The First Report also found that the two lines combined carried 77, 82, 81 and 44 percent of the total rail ton miles carried in the states of Washington, Montana, North Dakota, and Minnesota, respectively (App. 165).

[33] The 43.8 percent figure is taken from the applicant's Exhibit 16. It is based upon traffic which the Northern Lines concede, under the Commission's findings, will become noncompetitive by reason of the merger—some 6.1 percent—plus traffic at common points in the Northern Tier served by the Great Northern and the Northern Pacific which accounts for 37.7

combined revenues affected by overhead traffic competition, the total revenues affected amount to some 55 percent of the two lines' total revenues.

The merging lines and the court below have asserted that the revenue figures at common points are exaggerated. They contend that these figures should have been discounted, for example, by the amount of traffic moving between a common point and an origin or destination served by only one of the Northern Lines. However, such traffic is often subject to competitive pressure, as the Commission has previously noted. The ability of a shipper served by only one carrier to sell his goods in a market also served by other carriers is often heavily dependent on the relationship between the rates and service of the carrier serving him and the rates and service of other carriers linking competing shippers with the common market. Thus, the competitiveness of each carrier's rates and service directly affects the amount of goods it can move from points local to it to the market served in common.[34]

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percent of the two roads' freight revenues. See App. 316, 319; Applicants' Motion to Affirm, pp. 20–21.

This is a conservative measure of competition for traffic originating or terminating on the merging lines, since a station at one point on one line may also compete with a station at another point on another line. This is so where traffic can be transported to or from either point without excessive total costs.

[34] The Commission has observed "that a local producing area located on one railroad may be competitive in distant consuming centers with a similar one upon another railroad. In this situation the carriers are spurred to activity in establishing and serving such areas, and compete with each other in a manner which is not suggested by the proportion of noncompetitive stations to total stations, and similar facts."

This type of railroad competition is often called "market" competition. Further, testimony in this case indicates also the converse—that competitive pressure is not entirely absent on traffic moving from a point served by two or more carriers to separate but competitive distribution centers on each of the lines.[35]

The Commission has made no findings as to the extent to which traffic originating or terminating at common points on the Great Northern and Northern Pacific and moving from or to a point served by only one of them would not be competitive. Assuming, *arguendo,* that some reduction might be necessary, the question remains whether it would be significant enough to affect the result in this case. Given the general importance of market competition in the rail industry, it seems likely that any reduction would be small. Thus, the belated efforts to minimize even the common point data are entitled to little weight.

However the traffic shares are measured, it is plain that the merger would have a vast impact on rail competition in the Northern Tier. The transcontinental links between the Midwest and the Pacific Northwest are, in a very real sense, like a giant funnel through which an enormous volume of manu-

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Great Northern Pac. Ry. Co. Acquisition, 162 I.C.C. 37, 55-56. See also Meyer, Peck, Stenason and Zwick, *Competition in the Transportation Industries*, 207. The First Report took account of this type of competition in finding "* * * anticompetitive consequences of the merger would not be confined to stations where applicants are directly competitive. Today, rate innovations and service improvements by one of the Northern lines create strong pressure from the shippers for similar treatment by the other * * *." (App. 150).

[35] Ex. 231, pp. 21, 48.

factured, agricultural and natural resource products flows back and forth across the continent. Every transcontinental shipment moving in one direction or the other has added to its cost the price of transportation. Thus the direct routes represented by the Northern Lines are of particular significance to commerce between the great markets of the Northwest and the Midwest and the East. To be sure, there are other routes than the direct lines represented by the Northern Lines and the Milwaukee. By a combination of railroads it is possible to move cargo over the central route to and from the Pacific Northwest or over the far northern route through Canada. But, as the Commission has observed in its First Report (App. 146), these routes are circuitous. They represent transcontinental competition for the northern route,[36] but they are not adequate substitutes for the direct competition across the Northern Tier between the Great Northern and Northern Pacific.

2. COMPETITION FROM OTHER MODES OF TRANSPORTATION

There is nothing in the Second Report to show that intermodal competition is likely to offset the loss of rail competition in the Northern Tier that would result from the merger. The First Report found that rail competition, upon which the region is peculiarly

[36] Compare this Court's discussion of transcontinental competition between the southern and central routes in *United States* v. *Southern Pacific Co.*, 259 U.S. 214; and *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61. See also *Southern Pac. Co.—Control—Western Pac. R. Co.*, 327 I.C.C. 387; *Southern Pacific Co.* v. *United States*, 277 F. Supp. 671 (D. Neb.), affirmed *per curiam*, 390 U.S. 744.

dependent, is a far more significant factor in the Northern Tier than motor or water competition. The Commission there noted that the "States served by the Northern Lines produce a vast quantity of forest, agricultural, and mineral products" (App. 73) which comprise the bulk of the Northern Lines' cargo. In 1963, these products accounted for 65% of Great Northern's carload revenue ($143 million) and 70% of its carloads; they accounted for 48% of the carload revenue of the Northern Pacific ($95.3 million) and for 62% of its carloads (App. 75). "The rail hauls of the Northern Lines are among the longest in the world" (App. 77). And this "long-haul, lower-rated production of the west, principally agricultural, forest and mineral products, is 'generally not attractive to motor carriers' and 'is entirely dependent upon rail transportation'" (App. 139).

Water transportation is not a major factor in the region, providing "less competition than in any other region of the United States" (App. 77). "The only inland waterway of any consequence in the territory served by the Northern Lines is the Columbia River" and tonnage moving on that river "is extremely small in relation to that moved over the inland waterways in other parts of the country" (App. 139). In general, the First Report found that the railroads' "diversionary losses to intermodal competition have been more than offset by increases in traffic resulting from exploitation of the rails' inherent advantage in high volume, long-haul movements" (App. 138), and that the applicants enjoy this advantage even with respect

to interterritorial movements of manufactured articles. On the basis of the merging lines' increasing operating revenues, it found that "applicants have been successful in preventing avoidable diversion of traffic and in diverting from other modes traffic that is better adapted to transportation by rail" (App. 139.)[37]

The Second Report's different conclusions as to intermodal competition are supported by no refutation of these findings. As with rail competition, the Commission now approaches the issue from the unjustifiable standpoint of competition not in the Northern Tier but in applicants' entire territory, including the vast Burlington territory outside the Northern Tier. Its new discussion sets forth no substantial facts or theories tending to show how or to what extent competing modes provide realistic substitutes to shippers over the Northern Lines. Instead, it relies only upon

[37] Even in the category most vulnerable to motor carrier competition, the Northern Lines registered a net gain. App. 75–76, 136. The traffic of the Northern Lines is unbalanced, with raw materials and semi-finished products of agriculture, mines and forest moving from West to East, and a large volume of manufactured products moving East to West, with some further manufactured products entering the Pacific Northwest from California. Although commodities in the manufactured and miscellaneous groups are more vulnerable to diversion by other modes than much traffic in the agriculture, mine and forest categories, both the Great Northern and Northern Pacific increased their carloadings in this category and increased their gross freight revenues from it. In 1960 Great Northern's manufactures and miscellaneous revenues were $63.9 million; in 1963 they were $68.5 million; in 1960 Northern Pacific's manufactures and miscellaneous revenues were $58 million and in 1963 they were $63.3 million. *Ibid.*

general statements that railroads are "[t]ied to their steel rails" and that new superhighways, pipelines and improved waterways will offer more intense competition in the future (App. 298). It makes a general reference to plans to develop waterways for increased barge navigation (without identifying the waterways); refers to proposed improvements in Interstate Highways 90–94 which will reduce truck transit time between the Twin Cities and Seattle (App. 310); and produces a chart showing that at ten selected cities in applicants' area (five of which are in the territory of the Burlington, not the Northern Lines) there are numerous truck lines, bus lines and air lines (App. 318). Nor is the importance of intermodal competition established by the fact, relied upon by the district court, that the average length of haul for motor carriers in the applicants' territory (again including the Burlington) is longer than the average length of haul for railroads. This gives no understandable measure of the extent to which motor carrier service competes with the inherent advantages of the railroads in handling long-haul shipments or shipments of particular products.[38] Indeed, the Commission found in the First

[38] Because railroads interchange traffic very frequently, the distance a shipment moves on railroads is often much longer than the length of haul for the shipment on any one carrier. Thus, the average length of haul for rail shipments will on many types of traffic far exceed the average length of haul for each railroad. Motor carriers interchange traffic much less frequently, and the average length of haul for truck lines much more closely approximates the average distance shipments move by motor carriage.

Also, the average length of haul figures for railroads combine relatively short hauls of very heavy, bulky commodities little

Report that the Northern Lines' hauls are among the longest in the world (App. 77).

Clearly, recitation of the obvious fact that railroads, in general, no longer enjoy the transportation monopoly they formerly possessed does not constitute an adequate analysis of the extent to which competition from other modes will make up for the loss of competition between the Northern Lines. Congress intended that each mode would, through competition based on the strength of its inherent advantages, perform at its optimum level of service. It is not enough, therefore, for the Commission to have pointed out in the Second Report that competition from other modes diverts traffic from the Northern Lines; the crucial question is *how much* traffic is carried by other modes relative to the railroads' traffic and the increasing total volume of traffic for all modes. In such matters, the Commission cannot rely upon sweeping *ipse dixit,* but must show in its findings reasonable inquiry into the nature and volume of the traffic in question. See *B.&O.R. Co.* v. *Aberdeen and R. R. Co.,* 393 U.S. 87, 90–92; *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167.

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carried by trucks (*e.g.*, iron ore, coal) with very long hauls of numerous other goods, such as manufactures, lumber and fresh fruits.

The average distance of many *shipments* moved by the rail carriers in this case was demonstrated by record evidence showing that the average length of haul for all commodities moved by one of the applicant carriers from the Northeast to the Pacific Northwest was 2536 miles, from the Southeast 2499 miles, from the Southwest 1742 miles, and from the Midwest 1856 miles. Ex. 232, p. 10.

3. COMPETITION FROM THE MILWAUKEE

Although the Second Report speaks loosely of an "enhancement" of competition expected to flow from the Milwaukee conditions and treats that as an affirmative benefit from the merger (App. 321), the district court interprets this discussion as a contention only that the Milwaukee would be made stronger in relation to the Northern Lines (App. 30, n. 15). Even this more guarded conclusion, however, is at odds with the First Report's detailed consideration of the effect of the identical conditions. The Second Report contains no new findings in support of its new conclusion and there is no reason to believe that the Milwaukee's traffic gain would be enough even to offset substantially the loss of competition between the Northern Lines.

The Milwaukee was built between 1905 and 1909 primarily to provide effective competition to the Northern Lines (App. 120), but its competitive position has continued weak. (App. 108–113). West of the Twin Cities and Sioux City, Iowa, its traffic density is only half that of the Northern Lines, and its share of the Pacific Northwest traffic has declined sharply relative to the Northern Lines'. Its working capital position has deteriorated while that of the three major applicants has improved, and its net income is many times smaller (App. 104–106; see p. 8, *supra*).

Despite its relative weakness, however, the Commission found that approval of the merger would be inconceivable without reasonable assurance that the Milwaukee's essential transportation services would

continue. To this end it devised a series of conditions to the merger to give the Milwaukee the maximum of reasonable protection, finding that they "would make the Milwaukee a stronger carrier after merger than it is today" (App. 119). Nevertheless, it further found in the First Report that "[a]lthough Milwaukee would be a stronger carrier in the area extending from the Twin Cities and Head-of-the-Lakes [Duluth-Superior] to the Pacific Northwest, there would be one very large and strong railroad and one relatively weak carrier, whereas there are today two strong rail carriers and one relatively weak carrier" (App. 164). That is, while the Milwaukee would be stronger in absolute terms, compared to the merged Northern Lines it would be "relatively weaker than it is today" (App. 147).

The First Report noted that, in contrast with the Milwaukee's "anemic" financial condition (App. 104), the merging companies "are large, strong, and prosperous railroads" and "are growing stronger" (App. 78). The Milwaukee, which "would be completely engulfed by the lines of the New Company," is no "match for the New Company in terms of size, earnings, financial strength and economic capability" and cannot "provide the quantity and quality of service made possible by the proposed merger" (App. 92). Further, "the solicitation efforts of the Milwaukee would be puny in comparison with those of the New Company" (App. 124). The First Report concluded that "[a]fter merger, the New Company would be the dominant transportation enterprise" in the

Northern Tier, and "rail competition with the New Company [there] would be minimal" (App. 147, 165-166).

In its Second Report, the Commission did not change its view that the Milwaukee is much weaker at present than the two Northern Lines. Instead, despite its prior findings as to the relative strengths of the systems even after imposition of protective conditions for the Milwaukee, it concluded that "a properly conditioned merger, with NuCo [the post-merger company] competing against a strengthened Milwaukee, will serve to enhance rail competition, achieve a more desirable competitive pattern, while at the same time conferring substantial benefits upon the shipping public throughout the territory involved in this case" (App. 321). However, it made no new underlying findings to support this conclusion; the Commission's only specific findings on the impact of Milwaukee conditions are set forth in its prior report (App. 104-125). And those findings simply will not support the conclusion that competition is enhanced—either absolutely or relatively—by creating a gigantic combination of three strong railroads to compete against a weaker system.

That the protective conditions imposed would benefit the Milwaukee is self-evident. But this is only the beginning, not the end, of the inquiry whether they would adequately protect the public interest in rail competition. For the merger would strengthen the competitive position of Northern Lines as well. Before the Commission could reach a meaningful conclusion that competition in the Northern Tier would be

enhanced, or that the loss of competition between the Northern Lines would be substantially offset, it necessarily had to compare the relative positions of the two systems as they would exist after the merger. Yet the Second Report may be searched in vain for such a comparison.

In any event, it is plain that the Milwaukee conditions are not enough to counterbalance the significant competitive loss resulting from the merger. Using Commission counsel's computation (ICC Motion to Affirm, p. 29), the traffic gain to the Milwaukee—which represents diversion from the applicants' entire system including the Burlington—would be only $12.8 million, approximately 5.3% of the Milwaukee's total railway operating revenue for 1965 (App. 105).[39]

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[39] The bases for these computations are as follows: In a chart summarizing its computation of savings (App. 129) the Commission set forth in its First Report figures from which it is possible to compute estimates of traffic diversion between the Milwaukee and the applicants, including the Burlington:

I. Applicants' revenues susceptible to diversion to other carriers:	
* * *	
CMSP&P (Conditions 2, 3 and 5)-----	$11,622,206
Condition 1----------	8,342,390
Total ----------	19,964,596
Less:	
II. Revenue susceptible of diversion to applicants:	
Revenue gain interline from CMSP&P (see App. 119)-------	5,146,699
	14,817,897

The Second Report granted the Milwaukee's request for entry into Billings, and the Commission's findings do not value this

When compared with the applicants' combined revenues of $734.2 million (*ibid.*), the $39 million the Commission has found that the Northern Lines will save (App. 259), their combined net income of $81.6 million (App. 105) and their other benefits, this increase in revenue hardly suggests a significant enhancement in the Milwaukee's competitive position relative to the merged companies. The conclusion is inescapable that the Milwaukee conditions, far from constituting a significant affirmative benefit that could justify the merger, are at best a relatively limited offset against the anticompetitive impact of the merger.[40]

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condition. Commission counsel state, however, that it is worth $1.2 million. This results in a total figure of approximately $16 million as the value of traffic diverted from the merging lines' system to the Milwaukee. In the Second Report, however, these figures were reduced by 20% (App. 261), leaving a net estimated diversion to the Milwaukee of $12.8 million. Its 1965 total railway operating revenues were $241.3 million, of which $12.8 million represents 5.3% (App. 105).

The Commission's suggestion (ICC Motion to Affirm p. 29) that the amount of diversion could be *increased* or decreased by 20% would make the estimate so broad as to be almost meaningless. Moreover, the Commmission's Report did not find that the estimate could be increased; it expressly ruled that it should be reduced by 20% (App. 261).

The Commission's estimate may be high. In the Milwaukee-North Western merger proceeeding (see notes 6 and 9, *supra*) the president of the Milwaukee testifid that, taking into account the increased strength to be afforded the Northern Lines by their merger, the Milwaukee protective conditions would be of little or no avail. That testimony was in the record of this case (Exs. 260–262), but the Commission discounted it in the Second Report (App. 321–322).

[40] In this connection we point out that the Commission never considered the possibility of opening additional gateways to the Milwaukee under its power to establish reasonable through-

B. THE COMMISSION HAS IDENTIFIED NO SERIOUS TRANSPORTATION NEED OR OTHER PUBLIC BENEFIT THAT WOULD BE MORE LIKELY TO RESULT FROM THE MERGER THAN FROM CONTINUED RAIL COMPETITION

The primary merger benefits to which the Commission has pointed in the Second Report are estimated cost savings to the applicants and improvements in

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routes among carriers. 49 U.S.C. 1(4), 3(4) and 15(3). See *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425; *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612. In the exercise of these powers, the Commission cannot compel a carrier to short-haul itself against its will (49 U.S.C. 15(4); *Thompson* v. *United States*, 343 U.S. 549; *United States* v. *Great Northern R. Co.*, 343 U.S. 562). But this limitation does not apply if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation * * *" 49 U.S.C. 15(4). Cf. *Western Pac. R. Co.* v. *United States*, 382 U.S. 237 (Commission has power to remedy discriminatory refusal to enter into joint through rates with connecting line on through route).

Although the statute prohibits the establishment of through routes "for the purpose of assisting any carrier that would participate therein to meet its financial needs," this restriction is no bar here. For it was to protect the essential transportation services of the Milwaukee that the gateway conditions were imposed. App. 311, 321. An earlier attempt to open gateways to the Milwaukee had failed, but only because on the record it was not shown that the adequate transportation exception applied. See *Chicago, M., St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, sustained *sub nom. Chicago, Milwaukee, St. Paul & P. R. Co.* v. *United States*, 182 F. Supp. 81 (E.D. Wisc.), affirmed, 366 U.S. 745.

This merger proceeding has produced substantial evidence which would aid the Commission in determining that the exception to the ban on short hauling should be made in a Section 15(4) proceeding. Indeed, the findings which the Commission relies on to justify opening the gateways as a condition to merger—that opening the gateways would "* * * eliminat[e] artificial barriers to the development of new mar-

routing, scheduling, tracing, etc., expected to result from consolidation. As we have shown, any "benefits" from the Milwaukee conditions are at best partial offsets to the curtailment of competition that the merger will cause, and there is no basis for finding in them any net advantage to the public interest.

Neither the cost savings nor the purported service benefits to which the Commission has now pointed satisfy the requirement of the National Transportation Policy (see pp. 23–29, *supra*) that combination of strong and healthy carriers which are the principal competitors across a great transcontinental route not be approved in the absence of a special transportation need or other important countervailing benefits to the public.

Cost savings are not in this category because, first of all, they are not necessarily passed on to shippers or even reserved for transportation aspects of a merged company's conglomerate business. Second, studies of recent railroad mergers have shown that savings generally fall short of the proponents' estimates, and that large unifications frequently produce serious diseconomies of scale.[41] If, as appears to be

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kets, services, and sources of supply * * *" (App. 308), would "* * * give many shippers a realistic choice of railroads for the first time in history * * *" (App. 311), would add to competition in the areas affected, and would materially strengthen the disadvantaged Milwaukee—would go far to justify the findings called for under section 15(4) to open the gateways to Milwaukee.

[41] *Western Railroad Mergers*, *supra*, pp. 10, 13; Fieleke, *Toward a More Efficient Railroad System*, March/April 1969, New England Economic Review, 1, 17–18. A comprehensive study indicates that when traffic density reaches a level allowing effi-

the case, managerial diseconomies and other difficulties increase costs as a result of enormous size, the merged carriers' return may well tend to decline, with the effect at least of offsetting projected savings. Third, the First Report observed (App. 162–164), many cost savings can be achieved without merger through improved management and operational techniques, the introduction of computerization, centralized traffic control, the elimination of excess capacity, and the like. There is no indication in the Commission's Second Report of any reason why the parties might not achieve these savings without merger; each of the merging carriers certainly is in sufficiently sound financial condition to undertake such improvements.[42]

With respect to the matter of savings in general, it is important to consider—as the Commission did in the First Report (App. 158)—the obvious fact that any likelihood that the public will reap important

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cient operations, enlarging the size of a railroad system under one management results in raising costs, and that numerous American railroads seem to be sufficiently large that further mergers are not likely to improve efficiency. See Healy, *The Effects of Scale in the Railroad Industry* (reprinted in *Rail Merger Legislation*, Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on S. 3097, 87th Cong., 2d Sess., 735. For recent complaints and explanations of difficulties which have been encountered by merging lines in failing to attain predicted savings, see *Shippers Hit Deterioration of Railroad Freight Service—Blame Merger*, Journal of Commerce, February 24, 1969, p. 1, column 1; *Saunders Defends Merger*, New York Times, Sunday, March 9, 1969, Section 3, p. 1, column 8; *Seaboard Lays Problems to Penn-Central*, New York Times, April 28, 1969, p. 55, column 5.

[42] The Commission placed some weight on the fact that the

benefits from merger savings is greatest where such savings may help to improve the capabilities of carriers in precarious financial condition; where, as here, the merging carriers are already healthy and able to provide efficient service, the public interest in savings is considerably less.[43]

In this case as in others, the Commission has adhered to its past practice of relying primarily upon the estimates of the parties as to merger savings. The result, it has been observed, is that "there are few outside constraints on the level of savings to be estimated;" [44] reliance upon such questionable estimates is plainly undesirable.[45]

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railroads' return on investment, as compared with the return in other industries, is low (App. 299). Putting aside the question of whether the measures of return in other industries are comparable in light of the unique accounting practices of the railroad industry, there is simply no basis in this record to conclude that without the incentives of competition a greater return on rail operations will be produced. See generally Peck and Meyer, *The Determination of a Fair Return on Investment for Regulated Industries*, Transportation Economics, 199, 201, 241 (Columbia University Press 1965).

[43] Enhancing railroads' rates of return is plainly not a valid element of the public interest unless—as is not the case here—additional income is necessary to provide adequate service.

[44] *Western Railroad Mergers*, *supra*, p. 12.

[45] See *R. & O.R. Co.* v. *United States*, 386 U.S. 372, 437 (concurring opinion); *Udall* v. *Federal Power Commission*, 387 U.S. 428, 434; *Scenic Hudson Preservation Conf.* v. *Federal Power Commission*, 354 F. 2d 608, 620.

Since the case was reopened for the limited purpose of permitting the applicants to update their claims of cost savings, it was extremely important that the Commission make accurate findings as to the savings claimed. Because the appliacants were the only parties possessing data relevant to their recent operations the Department of Justice made repeated attempts

Nor is there any reason to attach special weight to the projected improvements in routing and scheduling or to the other anticipated operating efficiencies. Many such benefits, allegedly attributable to merger, could in fact be accomplished without merger by greater coordination of services and utilization of new techniques, as the First Report found (App. 162-164; see p. 14, *supra*). See also *Southern Pac. Co.—Control—Western Pac. R. Co.*, 327 I.C.C. 387, 404. See *Rail Merger Legislation, supra* note 41, p. 13. Indeed, in this case the Northern Lines began operating faster transcontinental freight service, in response to a competitive effort by the Milwaukee, even while the proceeding was pending (App. 82, 162).

It is true, of course, that there was substantial shipper support for the merger at the Commission's hearings. But much of this support was the result of the applicants' extensive promotional campaign (App.

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to obtain discovery from the applicants designed to show that a substantial proportion of the savings claimed could in fact be realized by them as independent companies. All of these requests for discovery were denied by the Commission even after the Department furnished information indicating that the applicants had data in their possession against which their claims could be easily tested. The Commission ruled that "there comes a point at which we must honor our concomitant obligation to complete our proceedings upon a rail merger application within a reasonable time" (App. 303). But it was the applicants, not the Department, which reopened the case on the savings issue. To perform its duty properly the Commission should have permitted a full adversary investigation of the applicants' claims. Even without such discovery the Department adduced evidence showing that the assumptions on which the revised savings claims were based appeared to be invalid. See Exhibits 267, 268, 269 and 271 (testimony of Dr. Wilson).

84–85).[46] And the record is replete with countervailing evidence demonstrating the importance of railroad competition to shippers in the territory involved because of its effects on rates (*e.g.*, Tr. 8899, 9105, 11654, Ex. 179), service (*e.g.*, Tr. 7024–7025, 7713, 7719-7720), and the desirability of industrial locations served by more than one railroad (*e.g.*, Tr. 8298, 6815-6822). A typical expression is that by the traffic manager of Oscar Mayer and Company, who described the benefits of competition in practical terms:

> Well, better service and better rate adjustments, if you'd just kind of sum it up. I mean that's what it pretty much boils down to. If you are a one railroad town you don't do as well service-wise or rate-wise or otherwise [as] if you got competition. [Tr. 9068][47]

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[46] See Ex. 203—a booklet distributed by applicants entitled *Consolidation—Key to Transportation Progress.* Although many witnesses, on cross examination, indicated their appreciation of the value of competition, there is some indication that more testimony on this point, and testimony against the merger, might have been forthcoming but for the apprehension of some shippers that they might incur the disfavor of the applicant carriers. See Ex. 179, p. 2.

[47] Many other witnesses also testified that active rail competition tends to produce lower rates and better service (Tr. 4123, 4546, 6126, 6135, 6175–6176, 6217, 6542, 6559, 6714, 6776, 6888, 6898–6899, 6918, 6965, 6976, 6983, 6990, 7014, 7094, 7138, 7155, 7165, 7241, 7253, 7260, 7355, 7363, 7458, 7558, 7646, 7673, 7704, 7972, 8020, 8140, 8175, 8866, 8877, 8899, 8931, 8951, 9045, 9068, 9082, 9199, 9145, 9295, 9713, 9819–9820, 10121–10122, 10155, 10546, 10554, 11365, 12592, 12618, 13282–13283, 13889, 13925, 13996, 14301). Numerous witnesses expressed their desire for and belief in the benefits of competitive rail service (Tr. 3718, 4206, 4226, 4306, 4570, 4837, 5462, 5504, 5757, 5860, 5976, 6028, 6185, 6200, 6586, 6702, 6885, 6959, 6976, 7024, 7035, 7100–7101, 7241, 7468–7469, 7949, 7499, 7894, 7902–7903, 7972, 8062, 8139,

The Commission has made no findings that the Northern Lines will be unable to furnish adequate transportation service to the public unless they merge or that merger is necessary to preserve rail service "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" (49 U.S.C. preceding Section 1). The ability of the Northern Lines to compete with other modes has, on the contrary, been amply demonstrated in the findings.

In this context, the conventional merger benefits to which the Second Report points fall far short of rising to the level of important public benefits that could properly be regarded as countervailing the serious public detriments of this drastically anti-competitive merger. Indeed, if the expected benefits enumerated in the Second Report were sufficient to justify this merger, it would be difficult to conceive of any possible rail merger that could fail to receive approval under the same standard.

C. THUS, THE COMMISSION AND THE COURT BELOW FAILED TO APPLY THE PROPER LEGAL STANDARD

In the First Report, which disapproved the merger, the Commission saw its task as—

> decid[ing] whether the disadvantages of a substantial lessening of competition, coupled with

8193, 8816, 8858, 8878, 9466, 9601, 9712–9713, 9800, 10154, 10538, 10473, 11083, 11136–11137, 10187, 11364, 11558, 12188, 12542, 12607, 12610, 12618, 12619, 12689, 12690, 12879, 12880, 13277, 13329, 13351, 13849, 13888, 13903, 13246, 13387, 13917, 13989).

> the adverse effect on carrier employees, outweigh the advantages that would be derived by applicants and by the shipping public. [App. 156.]

The First Report further recognized that in striking the balance between these factors the Commission must assume "an attitude of strict neutrality" (*ibid.*); that is, "[t]he public interest scale is balanced. It is not to be tipped by the slightest presumption for or against merger." (App. 158.) We think that this statement of the applicable standards under Section 5(2) of the Act and the National Transportation Policy—while perhaps lacking in specificity as to the weight to be given to competitive factors—is not far from the mark. And in fact the Commission's weighing of these factors in the First Report was a reasonably articulated exercise of its discretion within the guidelines of the statutory scheme.

It is harder to perceive the standards that the Commission imposed upon itself in reaching the opposite result on the same record in the Second Report. The one thing that is clear from the diffuse discussion of the law in that Report is that the Commission now thought that its earlier attitude toward competition had been too strict. (See also ICC Motion to Affirm, pp. 15–16.) The First Report, it said, had insufficiently appreciated that "the 1940 amendment was certainly not negative or restrictive toward mergers, but was at least a procedural tool designed to facilitate, promote and foster rail mergers consistent with the public interest" (App. 312–313). While this statement is not on its face necessarily inconsistent

with the applicable principles (see pp. 29–36, *supra*), in the context of the Commission's criticism of the First Report it must be read as indicating that the Commission now felt that its attitude toward mergers should be more favorable than the neutral balancing approach articulated in the First Report. In fact, the Second Report gives no evidence that the Commission now felt itself limited by any standard other than its general notion of the overall "public interest." It now simply noted, one after the other, the merger's anticompetitive effects, which it now "view[ed] in a different perspective" (App. 343), "the ever-increasing intermodal competition" (App. 344), the Milwaukee conditions, the new employee protection conditions, and the supposed other benefits of the merger, and reached the general conclusion that "Viewing the considerations anew, we conclude that the proposals, with requisite conditions, are entirely consistent with the public interest" (App. 344).

As we have noted, the district court's affirmance of the Second Report was, in the last analysis, nothing more than a generalized determination that the conclusions reached were reasonable and supported by evidence. See pp. 16–18, *supra*. Beyond stating with approval that it did not "think [the Commission] was guided by a presumption" in favor of mergers (App. 21), the court did not indicate—any more than the Second Report had—that there were in its view any statutory guidelines for the Commission's discretion to determine what balance between merger benefits and competitive losses satisfies the "public interest."

The fundamental error in the Commission's final

decision and in the decision of the district court is this failure to recognize and apply the guidelines that the statute does impose upon the Commission's discretion when, as here, it is confronted with a seriously anti-competitive merger proposal. As we have shown (pp. 23-29, *supra*), a meaningful regard for the values of competition incorporated in the concept of the public interest forbids the Commission to allow such an anti-competitive merger unless it is required by a *serious* transportation need or would secure *important* public benefits. This is not to deny the Commission's broad expert discretion in evaluating anticompetitive losses, assessing the seriousness of transportation needs or the importance of public benefits, and striking the balance between these factors to the extent that they may exist in a particular case. But in this case neither the Commission nor the court below indicated awareness that this was the process that the Commission was required to follow, and thus it is clear that the Commission did not exercise its discretion in the proper manner. And, as we have further shown, the opinions below offer no justification for concluding either that the anticompetitive effects of the merger would not be serious or that any transportation needs or public benefits were involved that would outweigh the serious anticompetitive effects.

Certainly it is no justification for this merger simply to point—as the Second Report does—to a statutory scheme that is receptive to railroad mergers to the limited extent that adherence to a comprehensive plan is not required. While certain combinations of railroads may be desirable, the Commission—as the

Court pointed out in *Penn Central*, *supra*—is not to approve every proposed merger. Rather, it is directed to choose among mergers and to approve only those as to which there is "convincing evidence that [they] will serve the national interest." 389 U.S. at 500.

We do not suggest that the Commission can never approve a merger of parallel competitors. *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25. It can and has properly done so on many occasions. *E.g.*, *Penn Central Merger Cases*, *supra*. But it cannot comply with the National Transportation Policy by creating giant economic concentrations from already powerful competitors unless it is clear that there are very substantial transportation needs or benefits to the public which clearly outweigh the competition which will be lost as a result of the merger. In the absence of such special factors, the presumption of the National Transportation Policy and of Section 5 is that the pressures of competition will better force achievement of the cost reductions, savings, and operational efficiencies which are claimed for mergers.

Regulation by the Commission, of course, restrains in considerable degree discriminatory practices and gross rate abuses by rail and other carriers. But it cannot substitute for initiative of the managements of the carriers, upon which the nation's transportation system depends for the origination of rate and service proposals to be submitted to the Commission for its approval. Competition can spur that initiative. New types of service such as special cars and rail-truck piggyback service, improved operating tech-

niques, better scheduling, research and innovation, all are matters controlled by railroad managements. Competition, far more than regulatory pressures, pushes those managements toward efficiency and better performance. Moreover, it is competition that best serves to assure a transmission of the benefits of efficiencies to the public generally. Even in the regulation of rates, maintenance of a railroad's rate base at its most efficient levels is not ordinarily achieved through regulation alone but through competitive pressures.[48]

Before approving a merger of healthy carriers which represent the major source of rail competition in a vast area, the Commission should be required to show why the increased "proficiency" and profitability that these already effective and prosperous railroads may achieve by consolidation are likely to benefit shippers more than the cost reductions and rate reductions from new techniques that competitive pressures have historically produced. If it cannot do so, and cannot point to some strong countervailing public need or benefit, then approval of the merger violates the discretion entrusted to the Commission under the National Transportation Policy. Such was the situation in this case.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the case remanded to the Commission for further consideration in accord-

[48] See *e.g.*, Meyer, et al., *Competition in the Transportation Industries*, *supra*, at pages 240, 241, 260; *Western Railroad Mergers*, *supra*, 35–36; *Rail Merger Legislation*, *Hearings*, *supra*, pp. 43, 79; Healy, *The Merger Movement in Transportation*, 52 American Economic Review, May, 1962 (reprinted in *Rail Merger Legislation*, Hearings, *supra*) pp. 792–793.

ance with the standards required by the Interstate Commerce Act.

Respectfully submitted.

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APPENDIX

Approved Unification Applications Involving Class I Line-Haul Railroads, 1955 to 1969

Railroads	*Date of Commission's Decision*
Merger of Nashville, Chattanooga & St. Louis into Louisville & Nashville	3–01–57, 312 ICC 676
Control of Toledo, Peoria & Western by Atchison, Topeka & Santa Fe and Pennsylvania	5–31–57, 295 ICC 523
Control of Spokane International by Union Pacific	12–20–56, 295 ICC 425
Lease of Chicago, St. Paul, Minneapolis & Omaha by Chicago & North Western	12–28–56, 295 ICC 441, 696
Merger of Litchfield & Madison into Chicago & North Western	12–27–57 (not printed)
Merger of Virginian into Norfolk & Western	10–08–59, 307 ICC 401
Merger of Erie and Delaware, Lackawanna & Western into Erie-Lackawanna	9–13–60, 312 ICC 185
Merger of Minneapolis, St. Paul & Sault Ste. Marie, Duluth, South Shore & Atlantic and Wisconsin Central	11–30–60, 312 ICC 341
Merger of Minneapolis & St. Louis into Chicago & North Western	10–13–60, 312 ICC 285
Control of the Baltimore & Ohio by the Chesapeake & Ohio	12–17–62, 317 ICC 261
Merger of Seaboard Air Line and Atlantic Coast Line	12–02–63, 320 ICC 122
Control of the Central of Georgia by the Southern	11–07–62, 317 ICC 729, 319 ICC 557, 320 ICC 377
Control of the Lehigh Valley by the Pennsylvania Railroad	4–04–62, 317 ICC 139
Merger of Great Northern, Northern Pacific and Chicago, Burlington & Quincy (incl. lease of SP&S) (The "Northern Lines" merger)	11–30–67, 331 ICC 228
Merger of New York, Chicago, & St. Louis Ry. into Norfolk & Western	6–24–64, 324 ICC 1

Railroads	*Date of Commission's Decision*
Lease of Wabash Ry. by Norfolk & Western	6–24–64, 324 ICC 1
Norfolk & Western Acquisition of Control of Erie Lackawanna	6–9–67, 330 ICC 780
Norfolk & Western Acquisition of Control of Delaware & Hudson	6–9–67, 330 ICC 780
Norfolk & Western Acquisition of Control of Boston & Maine*	6–9–67, 330 ICC 780
Norfolk & Western Aquisition of Control of Akron, Canton, & Youngstown	6–24–64, 324 ICC 1
Norfolk & Western lease of Pittsburgh & West Virginia	6–24–64, 324 ICC 1
Control of the Ann Arbor by the Detroit, Toledo & Ironton	12–18–62, 317 ICC 619, 320 ICC 325
Control of Chicago & Eastern Illinois by Missouri Pacific, and purchase of Evansville Line of Chicago & Eastern Illinois by Louisville & Nashville	2–16–65, 327 ICC 279 10–23–68, 334 ICC 273
Merger of New York Central and Pennsylvania	4–06–66, 330 ICC 328
Acquisition of New Haven Ry by Penn-Central	11–25–68, 334 ICC 25
Control of Georgia & Florida by the Southern (through subsidiaries)	3–29–63, 317 ICC 745
Control of Kansas-Oklahoma & Gulf by Texas & Pacific (incl. affiliated Class II roads)	6–22–64, 324 ICC 309
Control of Western Maryland by Chesapeake & Ohio and Baltimore & Ohio	2–21–67, 328 ICC 684
Merger of Chicago Great Western into Chicago & North Western	5–23–68, 333 ICC 236
Control Alton & Southern by Missouri Pacific and Chicago & North Western	4–19–68, 331 ICC 515

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